89- 1377

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

ANN TROITINO JOHNSTON, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

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QUESTION PRESENTED

Whether a Texas court may require a criminal defendant to prove prejudice from constitutionally deficient assistance of counsel by a preponderance of the evidence, when this Court, in Strickland v. Washington, 466 U.S. 668 (1984), has specifically stated that relief shall be afforded on a lesser "reasonable probability" standard.

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

No.

ANN TROITINO JOHNSTON, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

Ann Troitino Johnston respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals of Texas in this case.

OPINION BELOW

The opinion of the Fourteenth Court of Appeals (App., infra, 1a-11a) is unreported.

JURISDICTION

The judgment of the Fourteenth Court of Appeals was entered on June 15, 1989. The Texas Court of Criminal Appeals denied a petition for discretionary review on October 25, 1989, and denied rehearing on November 29, 1989 (App., infra, 14a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal proceedings, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATEMENT

This criminal case raises important issues concerning the standards for proving ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. Petitioner was convicted of involuntary manslaughter by reason of driving while intoxicated. The evidence supporting the conviction was very slim. Specifically, although intoxication was the essential disputed issue at trial, there was no breathalyzer or other scientific evidence to indicate that petitioner was intoxicated. The sole prosecution evidence bearing on that issue was the lay opinion testimony of two persons who saw petitioner after the accident, and who had themselves been drinking -- lay opinion testimony that

was contradicted by other credible record evidence.

The State's thin case received considerable assistance, however, from errors committed by petitioner's own counsel. The effect of the errors was to present new evidence detrimental to petitioner, as well as to repeat the State's case. In these circumstances, the Texas Court of Appeals' application of the wrong standard of proof for ineffective assistance of counsel effectively sanctioned a breakdown of the adversary system and casts serious doubt on the reliability of the ultimate outcome. Moreover, the Texas Court of Appeals' misunderstanding of this Court's standard under Strickland v. Washington, 466 U.S. 668 (1984), has surfaced repeatedly in Texas cases since Strickland and calls for clarification and correction by this Court.

1. In the early hours of May 11, 1986, petitioner was driving her car when it collided with another car. 3 SF 46-47. */ Susan Scrace, a passenger in the other car, was seriously injured, as was petitioner. 3 SF 214-215, 241. Scrace ultimately died of her injuries. 3 SF 117. After the accident, two witnesses, Jayna Brandes and Melissa Adams, who had emerged from a nearby bar, observed the scene and talked to petitioner. Petitioner waited at the scene for police to arrive, but because of an error in dispatching the police did not arrive until an hour and fifteen minutes after the accident. 3 SF 12. By that time, petitioner (after leaving her address and

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*/ "SF" refers to the "Statement of Facts" in the trial court. In Texas, the "Statement of Facts" is the term used for the verbatim transcript of the proceedings.

telephone number with bystanders) had left with her sister to obtain treatment for her injuries. 4 SF 353. Thus, the record contains no medical tests for alcohol content in petitioner's breath or blood. App., infra, 2a-3a; 3 SF 137. Petitioner was indicted for involuntary manslaughter by reason of intoxication under Tex. Penal Code § 19.05(a)(2).

Intoxication is an essential element of involuntary manslaughter by reason of intoxication under Texas law, and the question whether petitioner was intoxicated at the time of the accident was the chief issue at trial. Since the State had no medical evidence of intoxication, its proof of this element was limited to the observations of witnesses Brandes and Adams after the accident. Petitioner presented expert testimony from a clinical neuropsychologist that the effects of

a head injury like the one petitioner received in the accident could mimic intoxication in such a way that a layperson could easily mistake those effects for drunkenness. In fact, the expert testified that it would be impossible for a layperson to know the difference. 3 SF 219-221. Another witness who observed petitioner minutes after the accident testified that petitioner appeared to be in shock and did not appear intoxicated. 4 SF 352.

Thus, the jury had substantial grounds to entertain reasonable doubts about the reliability of witnesses Brandes and Adams' perceptions. These doubts were strengthened by the brevity of the encounter, the lateness of the hour, the emotions surrounding the accident, and evidence that Brandes and Adams

themselves had been drinking throughout the evening. 3 SF 93, 149, 206-207.

The testimony of Brandes and Adams had brought out some of the observations that led them to conclude that petitioner was intoxicated. As part of the defense case, petitioner's counsel called Les Radford, a private investigator who had interviewed both witnesses. 3 SF 188-210. Radford testified about some minor discrepancies between Brandes and Adams' statements to him soon after the accident and their testimony at trial. Because Radford had been called, however, the prosecutor was afforded an opportunity to show on cross-examination that Brandes and Adams' statements soon after the accident mentioned the same specific observations of petitioner's actions and demeanor that came out in those witnesses' trial testimony. App., infra,

4a-6a; 3 SF 200-207, 209-210. Thus, the jury heard the same damaging observations twice, and the prosecution was able to show prior consistent statements of its own key witnesses without waiting for a challenge to consistency.

The negative impact of the Radford testimony was not limited to its use to bolster the State's case, however. Substantial new statements from Brandes and Adams were admitted through Radford's report. Without objection by defense counsel, the State elicited from Radford hearsay testimony to the effect that Brandes told Radford that she heard petitioner ask Adams to slap petitioner's face in order "to help her sober up" before the police arrived. 3 SF 200. The State also elicited similar hearsay testimony to the effect that petitioner had said that she wanted a cup of coffee

"to sober up." Ibid. Neither Adams nor Brandes had testified that petitioner said anything about "sober[ing] up." 3 SF 158, 167. There followed page after page of transcript in which the State elicited Radford's damaging repetitions of Brandes and Adams' opinions about petitioner's alleged intoxication. 3 SF 200-207. Not only was the new evidence thus admitted through the defense, but also there was no cross-examination to test the reliability of Brandes and Adams' supposed statements to Radford.

The jury, apparently choosing to believe Brandes and Adams' testimony, convicted petitioner of involuntary manslaughter. The trial court imposed the maximum sentence, ten years' imprisonment. See Tex. Penal Code § 12.34(a).

2. On appeal, petitioner argued that her defense attorneys, in calling

Radford, made the prosecution's case rather than her own and caused a breakdown in the adversary system, violating her Sixth Amendment right to the effective assistance of counsel. The Texas Court of Appeals agreed that the marginal impeachment value of Radford's direct testimony was outweighed by the support that Radford gave to the chief prosecution witnesses. App., infra, 7a-8a. Assuming that this error satisfied the deficiency prong of the Strickland test, the court of appeals nevertheless held that petitioner had not satisfied the prejudice prong of that test, finding "no basis for speculating that the jury would have returned a verdict of not guilty had defense counsel chosen not to try to impeach the witnesses' testimony." App., infra, 8a. This language from the court of appeals opinion derives from a series

of Texas cases holding that a defendant claiming ineffective assistance of counsel must prove his claim by a preponderance of the evidence.

Texas' highest criminal court denied discretionary review, and petitioner now seeks review in this Court.

REASONS FOR GRANTING THE PETITION

By placing on petitioner the burden of establishing prejudice from her counsel's deficient performance by a preponderance of the evidence, the Texas Court of Appeals erected an impermissible barrier to the vindication of petitioner's Sixth Amendment right. In the case establishing the test for ineffective counsel claims, Strickland v. Washington, 466 U.S. 668 (1984), this Court outlined two inquiries: deficiency of performance

and prejudice. The deficiency prong examines whether counsel's performance was so deficient as to fall outside the "wide range of reasonable professional assistance." 466 U.S. at 689. The prejudice prong examines whether counsel's errors "undermine confidence in the outcome." Id. at 694.

This Court carefully considered what standard of proof should apply in the prejudice inquiry. It rejected a "some conceivable effect" standard, because virtually every act of counsel that met the deficiency test would also meet such a lenient prejudice test. 466 U.S. at 693. On the opposite end of the scale, the Court also rejected a "more likely than not" standard such as the one used in motions for a new trial based on newly discovered evidence. This preponderance standard, the Court held, is appropriate

in motions for a new trial, because it assumes that the newly discovered evidence can be injected into an otherwise fair and reliable proceeding. Id. at 694. By contrast, an ineffective counsel claim throws doubt on the validity of the entire proceeding in which counsel appears, because the availability of adequate counsel is "one of the crucial assurances that the result of the proceeding is reliable." Ibid. Hence, a defendant ought to be able to obtain relief for counsel deficiencies "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Ibid.

The proper standard, this Court held, can be borrowed from the standard applied to claims that the prosecution withheld exculpatory material from the defense under United States v. Agurs, 427

U.S. 97, 104, 112-113 (1976), and its progeny. Strickland, 466 U.S. at 694. That standard is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ibid. In other words, there is "a probability sufficient to undermine confidence in the outcome." Ibid.

In the years since Strickland, this Court has reaffirmed its rejection of a preponderance standard in favor of the more easily satisfied "reasonable probability" standard for the prejudice prong of the ineffective counsel test. For example, in Nix v. Whiteside, 475 U.S. 157 (1986), which rejected an argument that effective counsel would have allowed his client to commit perjury, the Court observed that "a defendant need not establish that the attorney's deficient

performance more likely than not altered the outcome." 475 U.S. at 175. See also Hill v. Lockhart, 474 U.S. 52, 59 (1985) (applying Strickland to guilty plea proceedings, including the "reasonable probability" standard for prejudice). The lower federal courts have followed suit. See, e.g., Deutscher v. Whitley, 884 F.2d 1152, 1160 (9th Cir. 1989) (reversing the district court's denial of habeas corpus on an ineffective counsel claim), petition for cert. pending, No. 89-753; Martin v. McCotter, 796 F.2d 813, 817 (5th Cir. 1986), cert. denied, 479 U.S. 1057 (1987); McNeil v. Cuyler, 782 F.2d 443, 448-449 (3d Cir.), cert. denied, 479 U.S. 1010 (1986).

The Texas courts have acknowledged that they must follow Strickland in evaluating ineffective counsel claims, although they have expressed doubt as to

whether they are required to do so in non-capital sentencing. Hernandez v. State, 726 S.W.2d 53 (Tex. Crim. App. 1986); Ex parte Cruz, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987) (earlier state-law standard applied to claim that counsel was ineffective in sentencing hearing for involuntary manslaughter); Stone v. State, 751 S.W.2d 579, 582 (Tex. App. -- Houston [1st Dist.] 1988, rev. ref'd) (following Cruz).

This acknowledgment of the duty to follow Strickland has not, however, produced a correct understanding of its requirements. Of particular relevance here, the error made below of placing the burden on the defendant to prove ineffectiveness of counsel by a preponderance of the evidence is frequently repeated in Texas. E.g., Moore v. State, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985) ("[t]he

burden of proving ineffective counsel falls on the appellant. Such a contention must be proven by a preponderance of the evidence") (citations omitted); Applin v. State, 705 S.W.2d 411, 413 (Tex. App. -- Fort Worth 1986, no writ) ("[t]he burden of proving ineffective assistance of counsel falls on the appellant and such a contention must be proved by a preponderance of the evidence."); Ferguson v. State, 699 S.W.2d 381, 382 (Tex. App. -- Fort Worth 1985, rev. ref'd) (same); Grant v. State, 696 S.W.2d 74, 77 (Tex. App. -- Houston [1st Dist.] 1985, rev. ref'd); Parker v. State, 693 S.W.2d 640, 643 (Tex. App. -- Beaumont 1985, no writ), overruled on other grounds, Reed v. State, 744 S.W.2d 112 (Tex. Crim. App. 1988). In these cases, the courts, while citing Strickland and pursuing a two-part inquiry, show no

awareness that this Court required only a "reasonable probability" of prejudice to support relief. Instead, these Texas courts force the defendant to bear the more stringent "more likely than not" or "preponderance of the evidence" burden considered and rejected in Strickland itself.

The effects are particularly pernicious in cases like petitioner's, in which the reviewing court finds or is willing to assume that the deficiency prong has been met. In such cases, the invalid preponderance standard operates only on the prejudice inquiry, where this Court has specifically rejected it. In this case, the prejudice argument was hard-fought and close, and the imposition of an unnecessarily harsh burden of proof on the defendant led to the denial of a constitutionally valid claim. Moreover,

the Johnston appeals court is not alone in its confusion, as the other Texas cases cited above show.

The erroneous standard applied by the court below is coupled with a plainly erroneous ultimate result in this case. The trial evidence amounted to nothing more than a credibility contest between witnesses who claimed that petitioner "appeared" intoxicated and other witnesses who testified that she did not. Moreover, the symptoms on which the State's witnesses based their lay opinions of intoxication could at least as plausibly have been caused by petitioner's head injury. Despite the flimsy evidence of intoxication, the court below was willing to assume the conclusion of the contested issue at trial: "In the present case defense counsel was faced with the grim task of dealing with two

unbiased State's witnesses who had observed appellant's intoxication at the time of the offense." App., infra, 7a (emphasis added). It is small wonder that, having assumed intoxication, the court below then determined that counsel's errors had not been shown to be outcome determinative. Had the court correctly applied the Strickland standard to the evidence in this very close case, it would have had to reach the opposite result.

Instead, the court assumed the conclusion to the principal disputed issue at trial -- whether petitioner was intoxicated -- and made only the most cursory nod toward the prejudice prong of Strickland. Rather than recite the proper standard and review the evidence in detail, the court made only the facile and incorrect assertion that Radford's

testimony was "cumulative," followed by the unelaborated conclusion that prejudice had not been shown. App., infra, 8a. That is not a proper performance of the reviewing function under Strickland, and the result reached in this case was not the correct one.

The Court should grant certiorari both to correct a serious miscarriage of justice in this particular case, and to clarify a problem in the application of its Strickland test that is causing endemic confusion in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1990

APPENDIX A

Affirmed and Opinion filed June 15, 1989.

THE STATE OF TEXAS

In The

Fourteenth Court of Appeals

No. C14-88-00873-CR

ANN JOHNSTON, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 449,279

OPINION

Appellant was convicted of involuntary manslaughter and sentenced by a jury to ten years' confinement in the Texas

Department of Corrections. On appeal, she alleges she was denied effective assistance of counsel. In addition, she alleges the trial court erred in allowing testimony to be bolstered. We affirm.

The facts reflect that on May 11, 1986, an automobile operated by appellant ran a red light and collided with another vehicle in an intersection. A passenger in the other vehicle died as a result of injuries sustained in the accident. After staying on the scene for some time, appellant left with an acquaintance prior to the time police arrived. Nothing in the record suggests appellant was tested for intoxication and the jury's finding of intoxication was apparently based solely upon the testimony of witnesses who observed her at the scene.

Two bystanders who stopped to render aid testified for the State. One of

them, who helped appellant out of her car and to a convenience store, testified to the following:

1. appellant asked for a cup of coffee before the police came because she was "f_____ up."

2. appellant smelled strongly of alcohol and her speech was slurred.

3. appellant's eyes were red and glassy.

In addition, both witnesses testified that, in their opinion, appellant was intoxicated based upon their observance of her.

In her first point of error appellant contends she was deprived of effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments. In particular she complains of defense counsel's decision to call a private investigator to the stand in

order to impeach the testimony of the State's witnesses.

The record shows that the defense called Les Radford to the stand after the State's witnesses had testified. Radford had been hired by the defense to investigate the accident. In the course of his investigation, Radford interviewed the two bystanders who testified for the State. Prior to his being called as a witness, his report and its contents had not been used at trial.

Through Radford's testimony, defense counsel sought to uncover some minor inconsistencies between the witnesses' testimony at trial and their earlier statements to Radford. During his examination, Radford referred to notes from his investigation. Among the points brought out to impeach one witness were the following:

1. She had a mixed drink at her home prior to going to the bar that she was leaving when she witnessed the accident.

2. She arrived at the bar about 11:00, rather than 8:00 or 9:00 as she testified.

3. She had told Mr. Radford that, in her opinion, Ann Johnston was in the state of shock.

4. She had told Mr. Radford that in her opinion, Ann Johnston's speech was not slurred or mumbled.

As to the other witness, defense counsel sought to bring out the following:

> That Ann Johnston's speech was not slurred or that [the witness] would not know whether it was slurred because she never talked to her before.

After viewing the investigator's report, the prosecutor, on cross-examination, reviewed damaging evidence contained in the report that had already been testified to by the witnesses:

1. That she heard [appellant] ask [the other witness] to slap her

face in order to help her sober up before the police arrived.

2. That [appellant] said that she wanted a cup of coffee to sober up before the police arrived.

Appellant maintains that the value of the inconsistencies was inconsequential compared to the damaging effect of allowing the prosecutor to reiterate his case and calling the investigator amounted to ineffective assistance of counsel.

Texas follows the federal standard, enunciated in Strickland v. Washington, 466 U.S. 668 (1984), in deciding whether a defendant has received effective assistance of counsel. Wilkerson v. State, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986). Under that standard, the defendant must establish two things: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. If either of the elements

is not established, the contention fails. Rico v. State, 707 S.W.2d 549, 556 (Tex. Crim. App. 1983). Moreover, a presumption exists in favor of counsel's conduct and a defendant has the burden of disproving "that, under the circumstances, the challenged action `might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689.

In the present case defense counsel was faced with the grim task of dealing with two unbiased State's witnesses who had observed appellant's intoxication at the time of the offense. The defense strategy was to make light of discrepancy between the witnesses' statements at trial and their statements shortly after the accident. In hindsight it appears that the impeachment points made on direct examination of the investigator were

outweighed by the prosecutor's review of damaging testimony on cross-examination. However, the damaging statements brought out by the State were cumulative of the testimony already given. The prior testimony of the witnesses was the same as what they had told the defense investigator after the accident with a few exceptions brought out by the defense. Even if calling the investigator and opening the floor to a rehash of the evidence was error, there is no basis for speculating that the jury would have returned a verdict of not guilty had defense counsel chosen not to try to impeach the witnesses' testimony. We overrule appellant's first point of error.

In her second point of error, appellant contends she was deprived of effective assistance of counsel in violation

of Article 1, Section 10 of the Texas Constitution. Under this point of error, she again complains of her counsel's decision to call the private investigator to the stand and his failure to object to the prosecutor's subsequent cross-examination of the investigator. In addition she alleges defense counsel committed the following errors:

1. failing to preserve error when the prosecutor asked a defense witness if he was being paid for his services;

2. calling appellant's sister to the stand which allowed the prosecutor to uncover the fact that appellant had been drinking earlier;

3. failing at sentencing to emphasize the effect of a felony conviction on an attorney and;

4. failing to properly prepare a defense expert.

We hold that the matters complained of are either matters of disagreement with a reasonably sound trial strategy or

minor failures of speculative significance. Further, the adequacy of an attorney's services must be gauged by the totality of the representation afforded the accused. Carr v. State, 694 S.W.2d 123 (Tex. App.--Houston [14th Dist.] 1985). We have reviewed the record and find that numerous pretrial motions were filed, numerous objections were made at trial, questions of admissibility were fought vigorously, eloquent arguments were made and a well-coordinated, thoroughly prepared defense was presented. Accordingly, appellant's second point of error is overruled.

In her third point of error, appellant alleges the trial court erred in allowing the prosecutor to bolster testimony of his fact witnesses by using their prior statement made to the defense investigator. As previously discussed, the

defense opened the door to the investigator's report in its attempt to impeach the State's witnesses. Once that door was opened, it was within the trial court's discretion to allow the prosecutor to cross-examination the investigator on the report, even if some of the evidence had previously been brought out by the State on direct examination of the witnesses. Accordingly, we overrule appellant's third point of error.

The judgment is affirmed.

/s/Bill Cannon
Justice

Judgment rendered and Opinion filed June 15, 1989.

Panel Consists of Justices Pressler, Cannon and Ellis.

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APPENDIX B
COURT OF CRIMINAL APPEALS OF TEXAS
--- CASE SUMMARY ---

PDR/Case Number: 1170-89
Petitioner: APPELLANT
Record Filed: 08-18-89

Style: Johnston, Ann R.

Offense: Involuntary Manslaughter

Punishment: 10 Years
Writ Number:

Trial Court ID Number: 321010263
County: HARRIS
Trial Court: 263RD DISTRICT COURT
Trial Court Case Number: 449279
Trial Court Judge: Allen L. Stilley
Court Reporter:

Court of Appeals Case: 14-88-00873-CR
COA Opinion Aff 6-15-89

Contents: Tr, SF, Brief, S. Brief, AMFR

Companion Cases:

Remarks:

Persons Associated with this Case:

	PARTY	PERSON CODE	BAR/CODE NUMBER	LAST NAME
1.	APP	ATT	002187000	Berg
2.	APP	ATT	006210500	Duncan
3.	STA	DAT	421010000	Holmes
4.	DCT	CRT	101010263	Judge Presiding
5.	COA	CLK	220000014	Smart
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	RECV NOTICE	DATE OFF: mm dd yy
1.	Y	
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PDR/Case Number: 1170-89 --- EVENT SUMMARY ---

Style: Johnston, Ann R.

EVENT NO.	EVENT-DATE mm dd yy	POST-PROCDG	EVENT
001	08-18-89		PDR FILED
002	09-19-89		NO RESPONSE FILED
003	09-27-89		WORKUP COMPLETE
004	10-25-89		PDR DISP
005	11-09-89		REHEAR FILED
006	11-16-89		WORKUP REH COMPLET
007	11-29-89		REHEAR DISP
008	11-29-89		FINAL DISP/REHEAR

DESCR	SEQ NO.	DISPOS	NOTIFIED mm dd yy
APP			08-18-89
STA			
APP			
APP		REFUSED	10-25-89
APP			11-09-89
APP		DENIED	11-29-89
APP		REFUSED	11-29-89

EVENT NO.	CALNDR	-DATE SET- mm dd yy	...ORAL REASON SET	ARC
001	RESPON	09-18-89	STA RESP DUE	
002	WORKUP	09-19-89	ATT WORKUP	
003	WORKUP	09-27-89	JUD REVIEW	
004	STATUS	11-09-89	REHEAR DUE	
005	MOTION	11-16-89	WORKUP REH	
006	MOTION	11-16-89	JUD REV REH	
007	STATUS	11-30-89	TO BE RETURN	
008	STORED	11-30-89	RETURNED COA	

Remarks:

LOC	DISP CD	REMARKS
CLK		
BGS		
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BGS		
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CLK		
COA	Y	

Remarks:

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Opin/Disp Record for Event Number: 008
Disposition without Written Opinion: Y

11-29-89
Case Number:
1170-89

Author of Majority Opinion: (Initials)
Original:
Granting Rehearing:
Opinions Concurring:
Opinions Dissenting:
Opinions Concurring and Dissenting:
Not Participation:
Not Participation:
Per Curiam: Published:

Denying RehearingOther:

West Publishing Cite:
=== is this the FINAL RULING in the Case?: Y ===

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1377

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

ANN TROITINO JOHNSTON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari
To the Fourteenth Court of Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Texas Court may require a criminal defendant to prove prejudice from constitutionally deficient assistance of counsel by a preponderance of the evidence, when this Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), has specifically stated that relief shall be afforded on a lesser "reasonable probability" standard.

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Tex. Penal Code Ann. § 1905(a)(2) (Vernon Supp. 1989) 2

Sup. Ct. R. 10 5,6

NO. 89-1377

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

ANN TROITINO JOHNSTON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To the Fourteenth Court of Appeals of Texas

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Fourteenth Supreme Judicial District affirming

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[1]For clarity, Respondent is referred to herein as "the State" and Petitioner as "Johnston."

Johnston's conviction and sentence is attached to the Petition for Writ of Certiorari. The Court of Appeals denied rehearing on July 13, 1989. The Texas Court of Criminal Appeals denied Johnston's petition for discretionary review on October 25, 1989, and her motion for rehearing on November 29, 1989.

JURISDICTION

Johnston seeks to invoke the Court's jurisdiction under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Johnston bases her claim on the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of proceedings and Disposition Below

On May 21, 1986, Johnston was indicted for the involuntary manslaughter of Susan Scrace, the indictment alleging that Johnston, while intoxicated, operated her motor vehicle and by accident and mistake caused it to collide with a vehicle occupied by Scrace causing her death. **See** Tex. Penal Code Ann. § 19.05(a)(2) (Vernon Supp. 1989). Upon her plea of not guilty, Johnston was tried before a jury, which on April 7, 1988, found her guilty of the charged offense. On July 7, 1988, the trial court assessed punishment at ten years in the Texas Department of Criminal Justice, Institutional Division. This conviction and sentence was affirmed by the Court of Appeals for the Fourteenth Supreme Judicial District of Texas on June 15, 1989. *Johnston v. State*, No. C14-00873-CR, slip op.

(Tex.App.--Houston [14th Dist.] 1989). Johnston's petition for rehearing was denied by that court on July 13, 1989. The Texas Court of Criminal Appeals refused Johnston's petition for discretionary review on October 25, 1989, and her motion for rehearing on November 29, 1989. Johnston filed her petition for writ of certiorari to this Court on February 27, 1990.

B. Statement of Facts

In the early morning hours of May 11, 1986, Johnston drove her Chrysler LeBaron convertible through a red light without braking and collided with Cynthia Fisher's Toyota Corolla. Susan Scrace, a passenger in the Toyota, died approximately four hours later of a ruptured liver and abdomen. Witnesses at the scene considered Johnston to be intoxicated. She smelled strongly of alcohol and asked for coffee so that she could sober up before police came to the scene (SF III 157-58).[2] Her eyes were red and glassy and her speech was slurred (SF III 163-166). She fell onto one witness (SF III 158), and did not know where she was (SF III 166). She was unable to get her keys out of the ignition because the engine was still in gear (SF III 78). Johnston did not avail herself of medical assistance at the scene, but instead wanted to make phone calls. Witness Melissa Adams assisted Johnston in making the calls because Johnston was unable to dial the phone or remember phone numbers. She asked Adams to slap her so that she could sober up before police arrived (SF III 168).

Johnston left the scene of the accident with her sister after the victims were taken to the hospital.

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[2]"SF" refers to the statement of facts of Johnston's trial, consisting of pleadings filed in the trial court and a transcript of the trial, by volume and page number.

Johnston did not seek medical treatment at any hospital that night or for the next few days (SF IV 358). Johnston did not contact police. Officers investigating the accident located Johnston by examining a credit card bill in her car and by investigating the car registration (SF III 132).

Johnston's trial defense was that the symptoms of intoxication shown at the scene of the accident were actually caused by a mild head injury suffered during the collision. She presented the testimony of a neuro-psychologist who examined her almost one year after the offense. He testified that her actions at the scene were consistent with those of a person who had suffered a head injury (SF III 211-258). Her sister, who arrived at the scene about forty-five minutes after the collision, testified that Johnston did not appear intoxicated (SF IV 345-378). An expert in accident reconstruction testified that, according to his calculations, it was the driver of the Toyota, rather than Johnston, who was exceeding the speed limit at the time of the collision (SF IV 263-297). Finally, an expert in alcohol burn-off rates testified that the victim, who was a passenger and not driving, was intoxicated (SF IV 301-336).

The jury found Johnston guilty as charged in the indictment. The trial judge, after reviewing the presentence report, assessed punishment at ten years in the Texas Department of Criminal Justice, stating that he would consider a motion for shock probation as provided by statute in one hundred twenty days.

Johnston appealed her conviction, alleging that her counsel was ineffective under both the United States and Texas Constitutions in five respects: 1) in calling Les Radford, a private investigator, who provided impeachment testimony of the eyewitnesses

but who also testified to their prior consistent statements; 2) in failing to object when the prosecutor asked an expert defense witness who was paying him; 3) in calling to the stand Johnston's sister, who testified that Johnston did not appear intoxicated but who also admitted that Johnston had been drinking earlier; 4) in failing at the sentencing phase of trial to emphasize the effect of a felony conviction on an attorney's career; and 5) in failing to properly prepare an expert witness for the defense. The Court of Appeals for the Fourteenth Supreme Judicial District rejected these arguments and affirmed the conviction.[3]

SUMMARY OF ARGUMENT

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Johnston's claim involves the court below's correct application of settled legal and constitutional principles set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to her particular fact situation. Johnston has advanced no special or important reason in this case and none exists.

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[3]In the court below, Johnston set out three points of error: (1) ineffective assistance of counsel in violation of the U.S. Constitution; (2) ineffective assistance of counsel in violation of the Texas Constitution; and (3) trial error in an evidentiary ruling. She did not, however, brief the first two points separately. In its opinion, the court below addressed as a federal claim only Johnston's assertion that counsel erred in calling Investigator Radford, apparently because that claim was presented first. The remaining allegations of deficient performance, as well as the challenge to counsel's decision to call Radford, were considered under Johnston's state constitutional claim.

The court below, in determining Johnston's federal claim, correctly determined that the alleged deficiency of counsel in calling to the stand a private investigator did not constitute an error that undermined confidence in the outcome of the trial. There was no basis for speculation that, absent counsel's strategic decisions challenged by Johnston, the jury's verdict would have been different. The lower court's opinion nowhere mentions the alleged erroneous standard of review of ineffectiveness claims which Johnston asserts was employed by that court.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Johnston has advanced no special or important reason in this case, and none exists. This case presents only the question whether well-settled constitutional principles were applied correctly to the facts of this case. Thus, no important question of law is presented.

II.

THE COURT OF APPEALS PROPERLY APPLIED THE TEST FOR JUDGING EFFECTIVE ASSISTANCE OF COUNSEL SET OUT IN STRICKLAND V. WASHINGTON AND CORRECTLY DETERMINED THAT JOHNSTON HAD FAILED TO SHOW PREJUDICE TO HER DEFENSE.

A. The Strickland Standard

To merit relief on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must show both: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable service; and (2) that the deficient performance prejudiced the defense such that there is a reasonable probability that the outcome of the trial has been undermined and the result of the trial would have been different. Unless both showings are made, a defendant is not entitled to relief. *Id.* at 687-97. Moreover, a court need not examine whether counsel's performance was deficient if it determines that a defendant suffered no prejudice. *Strickland* at 697.

In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential," *Id.* at 689, and every effort must be made to eliminate the "distorting effect of hindsight." *Id.* Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and a defendant must overcome the presumption that the "challenged action 'might be considered sound trial strategy.'" *Id.* To demonstrate

prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

B. The Decision of the Court Below

Johnston claims that the court below found that counsel's presentation of Radford's testimony constituted deficient performance under *Strickland*. Johnston then complains that the lower court improperly required her to demonstrate prejudice under *Strickland* by a preponderance of the evidence. There is no support in the record for these assertions. The court made no determination whether counsel erred in deciding to call the private investigator. It held only that the *Strickland* test was not met because there was "*no basis* for speculating that the jury would have returned a verdict of not guilty had defense counsel chosen not to try to impeach the [State's] witnesses' testimony." *Johnston v. State*, No. C-14-00873-CR, Slip op. at 4 (emphasis added). The court below, thus, concluded that Johnston was unable to show *any* prejudice from the alleged errors of counsel, much less the amount required by *Strickland*. Moreover, there is no indication in the opinion that Johnston was held to a preponderance standard. The conclusion of the lower court was that Johnston could not show that even those decisions by counsel, which in hindsight appeared not to further her defense, provided *any* basis for a different jury verdict. *Johnston v. State,* slip op. at 4.

The determination of the court below that Johnston was not prejudiced by the alleged deficiencies in counsel's performance is fully supported in the record. Johnston characterizes the state's case as "thin" and her potential defense as strong in an attempt to establish a reasonable probability that, absent

counsel's decision to introduce the testimony of Radford, the outcome of the trial would have been different. Her argument is not supported by the evidence. The testimony of eyewitnesses Adams and Brandes was unequivocal and compelling. The two women observed Johnston drive through the red light without braking, and then observed her demeanor after the collision. Johnston admitted her intoxication to them and even requested their help in hiding it. Although Johnston argues that the lack of any laboratory tests assessing her blood alcohol content demonstrates that the state's case was weak, she offers no authority for the suggestion that such evidence was inherently more reliable than that offered by the State. Moreover, as noted by the prosecutor, although Johnston claimed to have suffered significant injuries in the collision, she carefully avoided receiving medical treatment that could have exposed her to laboratory tests which would have corroborated the state's contention that she was intoxicated at the time of the collision (SF V 400).

Johnston further claims that the state's case was weak because she presented evidence, through a neuropsychologist, that her behavior was due to a head injury sustained during the collision. However, this witness, who was not a physician, did not examine Johnston until nearly a year after the injury occurred. His testimony cast no significant doubt on the evidence of intoxication described by two disinterested witnesses, Adams and Brandes, such as the alcohol on her breath and her inculpatory statements.

Johnston alleges that the jury could have entertained reasonable doubt by virtue of the testimony of another witness who observed her minutes after the accident and testified that she did not appear intoxicated. The record reflects that the witness to whom Johnston refers was her sister, that her observation of

Johnston occurred forty-five minutes after the accident occurred (after Johnston had, at her own request, been slapped and given coffee in order to sober up), and that her testimony at trial was so unconvincing that the decision to call her as a witness constituted one of Johnston's claims of ineffective assistance of counsel in the court below. In light of these facts, Johnston's present attempt to offer her sister's testimony to this Court as support for her argument that, absent the alleged error in counsel's performance, the jury would have entertained a reasonable doubt as to her guilt is simply not credible.[4]

Johnston cites several Court of Criminal Appeals' and state intermediate Courts of Appeals' opinions which, she claims, erroneously require a defendant to demonstrate prejudice from counsel's errors by a preponderance of the evidence. Contrary to Johnston's assertion, however, none of the cited cases require a defendant to bear such a burden in demonstrating prejudice under *Strickland*. The language in the cases of which Johnston complains pertains to the heavy burden imposed on a defendant who is attempting to show that specific acts of counsel were outside the wide range of professionally competent assistance,

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[4]Johnston also complains that, in its assessment of prejudice, the court below erroneously assumed the fact of her intoxication. This claim is nothing more than an attempt to challenge the sufficiency of the evidence. Johnston did not challenge the sufficiency of the evidence in the court below and may not raise such a claim for the first time on certiorari review. Moreover, *Strickland* teaches that, in making the determination whether a specified error resulted in the required prejudice, a court should presume, absent a challenge to the judgement on grounds of evidentiary insufficiency, that the judge or jury acted according to the law. 466 U.S. 694. Because Johnston has never challenged the sufficiency of the evidence to sustain her conviction, the court below correctly assumed the facts supported by the verdict.

a standard formulated by the Fifth Circuit in *McKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), adopted by Texas courts in *Carraway v. State*, 417 S.W.2d 159, 163 (Tex. Crim. App. 1967), and sanctioned by this Court in *Strickland v. Washington, supra*:

> To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. *Cf. Trapnell v. United States*, 725 F.2d at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the *performance standard* are insignificant: the different formulations are mere variations of the overarching reasonableness standard.

Strickland at 696-697. (Emphasis added). Because the cases named by Johnston do not stand for an erroneous application of the prejudice standard set out in *Strickland*, her claim is without merit.

Moreover, even had the court below imposed a burden of persuasion on Johnston to establish by a preponderance of the evidence facts necessary to establish prejudice under *Strickland*, such would be proper. *Strickland* arose in the context of a habeas corpus petition brought under 28 U.S.C. § 2254. Thus, Strickland was required to establish facts necessary to

establish ineffective assistance of counsel in his habeas petition by a preponderance of the evidence. Nonetheless, this Court held that the rule announced in *Strickland* was the same whether the case arose on direct appeal or in collateral proceedings. 466 U.S. at 697-98. Thus, a requirement that Johnston demonstrate by a preponderance of the evidence facts sufficient to establish prejudice under *Strickland* would be proper. Johnston's claim to the contrary is meritless.

The record reflects that the court below applied the correct constitutional standard, and Johnston's claim involves only the application of this well-settled constitutional standard, enunciated in *Strickland v. Washington*, *supra*, to her particular fact situation. This Court sits to decide important, novel or recurring questions implicating constitutional guarantees, not to review evidentiary determinations founded on settled principles of constitutional law. Johnston's claim does not justify this Court's exercise of its certiorari jurisdiction. *Tacon v. Arizona*, 410 U.S. 351, 352 (1983); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For the foregoing reasons, the state respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

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No. 89-1377

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

ANN TROITINO JOHNSTON, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTEENTH COURT OF APPEALS
OF TEXAS

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The State's brief in opposition consists of essentially three things: a misstatement of the facts of the case (Br. in Opp. 3-5, 8-10); a defense of the erroneous preponderance-of-the-evidence standard (id. at 11-12); and, despite that defense, a general denial that such a standard was applied in this case or is applied in Texas generally (id. at 8, 10-11). The State succeeds only in proving that the facts of this case do compel a finding of prejudice and that Texas courts are routinely applying standards that cannot be squared with Strickland v. Washington, 466 U.S. 668 (1984). Because this is a case in which those incorrect standards led to an incorrect result, and because the error infects Texas decisions generally, this is an appropriate case for a grant of certiorari.

1. Before we turn to the important legal issues presented by this case, we must clarify the factual setting in which those issues arise. The key dispute in this case is whether it was prejudicial for defense counsel to call a witness (Les Radford) who, among other damaging things, testified twice that petitioner admitted at the time of the accident that she needed to "sober up." See Pet. 9-10; 3 SF 200.[1/] The reason why that testimo-

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[1/] Because the court below denied petitioner's claim solely because it held she had not shown prejudice (Pet. App. 8a), the only issue before this Court is prejudice. It is true that the state court did not affirmatively hold that counsel's performance had been deficient, and we have not, as the State asserts (Br. in Opp. 8), ever said otherwise. But the only importance of that fact is that the issue will remain open for litigation on remand if this Court reverses. Even on that issue, it should be noted, Texas courts appear to be acting inconsistently with this Court's decisions. This Court has held that "even an isolated error of counsel" can constitute ineffective assistance of counsel (Murray v. Carrier, 477 U.S. 478, 496 (1986)) and that "the type of breakdown in the adversarial process that (Cont'd)

ny was so harmful was that, before that defense witness was called, the two witnesses to whom such a remark was supposedly made had given their direct testimony without claiming that petitioner had said anything about needing to "sober up." See 3 SF 70-85, 146-172.

The State does not deny that the alleged admissions of a need to "sober up" were the single most critical piece of evidence; to the contrary, the State proves their importance by relying on

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implicates the Sixth Amendment is not limited to counsel's performance as a whole" (United States v. Cronic, 466 U.S. 648, 657 n.20 (1984)). Texas courts, by contrast, invariably invoke "the totality of the representation afforded the accused" (Pet. App. 10a) as an excuse to overlook the impact of isolated errors. See, e.g., Ex parte Cruz, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987); Bridge v. State, 726 S.W.2d 558, 571 (Tex. Crim. App. 1986); Wilkerson v. State, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986); Butler v. State, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986), cert. denied, 480 U.S. 940 (1987); Ex parte Perkins, 706 S.W.2d 320, 323 (Tex. Crim. App. 1986); Carr v. State, 694 S.W.2d 123, 126 (Tex. App. 1985, rev. ref'd).

those admissions over and over again in an effort to show petitioner's guilt. Br. in Opp. 3, 9, 10. Thus, far from denying the prejudicial impact of those alleged admissions, the State has established their enormous importance in this case. Moreover, the State compounds the error by pretending that the record contains statements that are simply not there. That deception is significant. The State cites transcript pages for the alleged statements by petitioner that she needed to "sober up" (3 SF 157-158, 168, cited in Br. in Opp. 3), but the words "sober up" do not appear on the cited pages. What do appear on those pages are statements by petitioner about being in poor condition and needing assistance -- statements that the expert testimony (3 SF 214-221) shows were the result of the injury she sustained in the accident.

By misrepresenting the evidence, the State masks the gravity of the error made by defense counsel at trial. Before the defense put on its case, the State's evidence of a necessary element of the crime--intoxication--consisted of the lay opinions of witnesses Brandes and Adams, which were based on their observation of petitioner's appearance and behavior just after the accident. The defense countered that testimony by presenting a medical expert who explained in detail how the head injury petitioner received would mimic the effects of intoxication,[2/] by

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[2/] The State attempts to belittle the neuropsychologist's testimony because he was not a physician. What the record reflects, however, is that the expert holds a doctorate and board certification in clinical psychology with specialized training in neuropsychology. 3 SF 211. Since neuropsychology is the specialized field that studies the effect of brain impairment on behavior, a neuropsychologist is more qualified than most physicians to explain the behavioral effects of a head injury, which were at issue at trial. (Cont'd)

bringing forward another witness who testified that petitioner did not appear intoxicated just after the accident, and by pointing to the absence of objective proof of intoxication. All of that evidence was undermined, however, because defense witness Radford gave the "sober up" testimony and reported Brandes and Adams as calling petitioner "loaded" (3 SF 201), "real drunk" (3 SF 205), and "f_____ up because of liquor" (3 SF 206). Before counsel's error in calling this witness, the State's evidence on intoxication was based on lay observa-

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See 3 SF 212. Moreover, the neuropsychologist based his opinion on undisputed medical records as well as photographs of the accident and witness statements. 3 SF 213-214, 243-244, 252-253. As he testified repeatedly, once the head is injured, it is impossible for a lay observer to draw any valid conclusions about drug use or intoxication. 3 SF 220, 224, 247. He also testified that a delay of a year between an accident and a neuropsychological examination does not make a difference in diagnosing the head injury. 3 SF 243, 249.

tions discredited by expert testimony. Therefore, an apparent admission of intoxication by the defendant had far more than a "reasonable probability" of tipping the scales for the jury. Strickland, 466 U.S. at 694.

While it is unfortunate that the State of Texas feels a need to misrepresent testimony so flagrantly in order to defend the judgment below,[3/] it is the

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[3/] The State has misrepresented the testimony at trial in other ways that are perhaps less important but no less disingenuous. For example, the State twice claims that petitioner's sister, who testified that petitioner was not intoxicated, did not see her until 45 minutes after the accident. Br. in Opp. 4, 10. The State cites no support for that statement, and there is none. The only evidence bearing on the point shows that petitioner's sister lives 10 minutes from the scene of the accident, was called immediately, and came there right away. 4 SF 346. The State also insinuates that petitioner left the scene of the accident prematurely (Br. in Opp. 3-4) when in fact the undisputed testimony shows that petitioner stayed at the scene for "about an hour" while "waiting for the police to show up." 4 SF 349, 358-359. The very police witness whose testimony the State cites also made clear (Cont'd)

State's heavy reliance on that very testimony that provides the most forceful proof of just how important and prejudicial Radford's testimony was. The facts of this case leave no room for doubt that the prejudice prong of the Strickland test was met. The application of an impermissibly high standard of proof by the court below led to an incorrect result that this Court should correct. It is to that error of law that we now turn.

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that "the suspect did not leave the scene before aid was rendered and it was just a regular major accident." 3 SF 132. Furthermore, petitioner left her name and the address to which she was going with bystanders (4 SF 353), but the police did not arrive until all of the witnesses and the parties had gone (3 SF 12-13). Similarly, the State claims (Br. in Opp. 9) that witness Adams observed petitioner run through a red light without braking, when in fact that witness testified that she did not look at the accident scene until after the accident (3 SF 151-152). Finally, the State contends that petitioner somehow suppressed evidence of her intoxication by "carefully avoiding receiving medical treatment" (Br. in Opp. 9), but in petitioner remained on the scene with the paramedics and therefore clearly was avoiding no one (4 SF 347-350, 381-382).

2. It is hornbook law in Texas that "[t]he defendant has the burden of proving ineffective counsel by a preponderance of the evidence." M. Teague & B. Helft, Texas Criminal Practice Guide § 91.02[5][a], at 91-11 (1989).[4/] The State therefore is forced to defend, and does explicitly defend, that standard. Br. in Opp. 11-12.

This Court, however, expressly rejected the preponderance standard in Strickland, 466 U.S. at 694: "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the out-

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[4/] Judge Marvin O. Teague, whose name appears first on the title page of this treatise (as "editorial consultant"), sits on the highest criminal court of the State.

come." In fact, the Court singled out the "preponderance" standard as applied to the prejudice prong (which the Court also referred to as the "outcome-determinative test") for special condemnation: "With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today." Id. at 697.[5/] The State's effort to defend its preponderance standard in the face of Strickland only serves to confirm that Texas will not come into conformity with this Court's

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[5/] The State quotes the passage immediately preceding this sentence as if it somehow supported Texas's standard for ineffective assistance. Br. in Opp. 11. But our issue is that Texas applies a "preponderance" standard to the "prejudice" prong of the Strickland inquiry, and neither the cases that the State cites nor the Strickland passage that the State quotes has anything to do with that issue.

decisions unless this Court reverses one of the erroneous Texas decisions.[6/]

3. While the State also asserts that the court below did not apply the "preponderance of the evidence" standard, the words that the court used reflect that such an impermissibly high standard was in fact applied. Since it is the

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6/ Applying an erroneous standard to the prejudice prong of ineffective counsel claims can have important practical consequences. A recent survey of 702 federal court of appeals cases involving such claims shows that the largest group, 41.45%, were denied because the court felt that no prejudice had been shown. Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 Geo. L.J. 413, 430, 458 (1988). While "the circuit courts explicitly found that counsel's performance did not fall outside of the wide range of reasonable professional conduct in only 54.3% of all ineffective assistance claims," only 4.27% of the ineffective counsel claims were granted. Id. at 430, 458. The author of the study concludes that "proof of prejudice resulting from ineffective assistance of counsel is so virtually impossible that courts should not engage in fine calculations about the degree of prejudice caused by counsel's clearly inadequate performance." Id. at 440 (footnote omitted).

substance of a decision, not its incantation of particular phrases, that guides this Court's review, the application by Texas courts of constitutional principles that are clearly wrong cannot be ignored.7/

What is clear from the opinion is that the court below incorrectly focused on whether "the jury would have returned a verdict of not guilty" (Pet. App. 8a (emphasis added)), rather than asking the correct question under Strickland, which is whether "there is a reasonable probability that, but for counsel's unprofes-

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7/ Earlier this Term, for example, the Court reversed a decision that erroneously limited a Freedom of Information Act exemption to documents that had been originally compiled--as opposed to just compiled--for law enforcement purposes. The respondent alleged that the case did not present the question because the court of appeals had not used the exact words "originally compiled," but this Court disagreed. John Doe Agency v. John Doe Corp., 110 S. Ct. 471, 476 n.5 (1989).

sional errors, the result of the proceeding would have been different" (466 U.S. at 694 (emphasis added)). Not surprisingly, Texas's highest criminal court continues to make this same mistake. See Culver v. State, 786 S.W.2d 7, 8 (1990) ("appellant must show that but for counsel's unprofessional errors, the result of the proceeding would have been different") (emphasis added in part and omitted in part). Thus, there is simply no doubt that the prevailing Texas standard is much higher than constitutionally allowed. The limited discussion given to this issue in the opinion below simply reflects this consistent misunderstanding of the Strickland standard. Given the overwhelming weight of Texas authority behind a mistaken standard, it is not surprising that the court below, in what it apparently regarded as a routine af-

firmance, reflected the standards it was applying by reference to leading cases.

As Culver shows, it is on the "prejudice" prong, not the "deficiency" prong, that Texas courts are routinely disobeying the decisions of this Court. The State's contention to the contrary (Br. in Opp. 10-11) is simply wrong. See also note 8, infra.

Further evidence that the decision below results from an erroneous prejudice standard can be found in the cases it cites. See Pet. App. 6a, 7a, 10a (citing Wilkerson v. State, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986), cert. denied, 480 U.S. 940 (1987); Rico v. State, 707 S.W.2d 549, 556 (Tex. Crim. App. 1983); Carr v. State, 694 S.W.2d 123 (Tex. App. 1985, rev. ref'd)). Although the court below cited portions of Wilkerson and Carr to support its decision, the por-

tions cited deal with the deficiency prong only. Wilkerson, 726 S.W.2d at 548-549; Carr, 694 S.W.2d at 126. Since the standard for deficiency is far harder to reach than the standard for prejudice, this citation, in a case hinging on prejudice, in itself shows a confusion harmful to the defendant. Compare Strickland, 466 U.S. at 689 (review of counsel's performance for deficiency is "highly deferential") with id. at 694 (lesser "reasonable probability" standard for prejudice prong).

We have already cited half a dozen Texas cases that expressly applied the erroneous preponderance-of-the-evidence standard to ineffective counsel claims. Pet. 17-19. To these cases could be added many more, from the Texas Court of Criminal Appeals (the highest criminal court) and the appeals courts. See,

e.g., Cannon v. State, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984); Hall v. State, 766 S.W.2d 903, 906 (Tex. App. 1989); Curtis v. State, 754 S.W.2d 460, 464 (Tex. App. 1988, rev. ref'd); Addington v. State, 730 S.W.2d 788, 791 (Tex. App. 1987, rev. ref'd); Carter v. State, 702 S.W.2d 774, 776 (Tex. App. 1986, rev. ref'd).[8/]

Even in its submission to this Court, the State persists in refusing to accept the standard of proof clearly laid out by this Court for evaluating the prejudice prong of ineffective assistance

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8/ The Cannon case, decided a month before Strickland and stating an impermissible "preponderance" standard, is routinely cited as the leading Texas case. The recent Hall decision, in a mastery of understatement, observes that "Texas' standards for determining ineffectiveness of counsel, particularly to determine when ineffectiveness is prejudicial, are not more protective than the federal standards enumerated by the Supreme Court in Strickland." 766 S.W.2d at 906 (emphasis added).

of counsel claims. Early in its brief, the State quotes extensively from this Court's description of the deference given to counsel's performance in the deficiency prong of the ineffectiveness inquiry. Br. in Opp. 7-8 (quoting Strickland, 466 U.S. at 697). The court below, however, assumed that petitioner's counsel performed deficiently, and addressed only the prejudice prong, which carries with it a less demanding standard. Pet. App. 7a-8a.

The State also makes the extraordinary assertion that, unless the defendant challenges the sufficiency of the evidence, a court, in determining whether counsel's deficient performance prejudiced the defendant, need not decide whether the prosecution evidence was strong or weak but can instead simply assume factual guilt. Br. in Opp. 10

n.4. That is, of course, not the law. See Strickland, 466 U.S. at 695-696; see also id. at 694 ("An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower."). The State admits that "the court below * * * assumed the facts supported by the verdict," as if there had been an error-free trial and the only challenge was to the sufficiency of the evidence. Br. in Opp. 10 n.4. This again confirms that the court below did not follow Strickland and, if it had, could not have reached the result that it did.[9/]

9/ In fact, it is the State that is trying to erect the wrong burden of proof by treating this case as if the question were evidentiary suffi- (Cont'd)

The proper task of the reviewing court was clearly set out in Strickland: "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." 466 U.S.

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ciency. For example, the State observes that we cite "no authority" for the proposition that objective medical evidence of intoxication, which was wholly lacking in this case, is "inherently more reliable" than lay opinion testimony. Br. in Opp. 9. But (aside from the fact that that proposition is self-evident) the issue is not whether any particular evidence was "inherently more reliable" than any other kind; it is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695 (emphasis added). The absence of any evidence of intoxication, other than lay opinion testimony, surely created a reasonable probability that, but for the introduction of damning evidence by defense counsel, the jury would have entertained a reasonable doubt about petitioner's alleged intoxication. See also Kimmelman v. Morrison, 477 U.S. 365, 390 (1986).

at 696 (emphasis added). That is not what the court below did in this case. Instead of evaluating the evidentiary picture before and after counsel's error, it assumed guilt (Pet. App. 7a) and then jumped to the conclusion that there was nothing counsel could have done to alter the outcome. Had the court properly followed the mandates of Strickland, it would have been compelled to recognize how weak the State's case was without the Radford testimony and then conclude that the Radford testimony not only bolstered the State's case, but likely erased any reasonable doubt the jury otherwise would have had concerning guilt. Thus, had the proper standards been applied correctly to these facts, the court below could not have affirmed the judgment of conviction on the basis on which it did.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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